(3)

No. 89-376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GENERAL DYNAMICS CORPORATION FOR A WRIT OF CERTIORARI

DUNAWAY & CROSS
MAC S. DUNAWAY
Counsel of Record

GARY E. CROSS
PETER B. SHERMAN
1146 19TH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 862-9700

ATTORNEYS FOR AMICUS
AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

A. *TREVINO'S* DEFINITION OF "APPROVED" CONFLICTS WITH A BASIC PREMISE OF *BOYLE* 3

B. *TREVINO'S* HOLDING THAT THE COURTS MUST LOCATE THE EXERCISE OF GOVERNMENT DISCRETION AS TO DISCRETE DESIGN FEATURES THREATENS UNDUE INTERFERENCE WITH THE GOVERNMENT'S PROCUREMENT POLICIES AND WOULD FRUSTRATE THE CENTRAL CONCERNS OF *BOYLE* 7

C. *TREVINO'S* NARROW INTERPRETATION AND APPLICATION OF THE GOVERNMENT CONTRACTOR DEFENSE TEST CONFLICTS WITH THE TEST AS APPLIED IN OTHER CIRCUITS 9

D. THE NAVY'S CONTINUED USE OF THE EQUIPMENT WITH KNOWLEDGE OF THE ALLEGED DEFECTS CONSTITUTES APPROVAL UNDER THE GOVERNMENT CONTRACTOR DEFENSE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases Page

Boyle v. United Technologies Corp.,
108 S. Ct. 2510 (1988) ..... *passim*

Dowd v. Textron, Inc.,
792 F.2d 409 (4th Cir. 1986),
cert. denied, 108 S. Ct. 2897 (1988) 12, 13

Harduvel v. General Dynamics Corp.,
878 F.2d 1311 (11th Cir. 1989) 11, 12

Ramey v. Martin-Baker Aircraft Co.,
874 F.2d 946 (4th Cir. 1989) 13

Schwindt v. Cessna Aircraft Co.,
No. CV485-472 (S.D. Ga. 1988) 12

Shaw v. Grumman Aerospace Corp.,
778 F.2d 736 (11th Cir. 1985),
cert. denied, 108 S. Ct. 2896 (1988) 9

Smith v. Xerox Corp.,
866 F.2d 135 (5th Cir. 1989) 10, 11, 12

Trevino v. General Dynamics Corp.,
865 F.2d 1474 (5th Cir. 1989) ..... *passim*

Trevino v. General Dynamics Corp.,
876 F. 2d 1154 (5th Cir. 1989) (*en banc*) 5, 10, 11

Statutes

Federal Tort Claims Act,
28 U.S.C. § 1346(b) 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-376

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

GLORIA TREVINO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITION OF GENERAL DYNAMICS CORPORATION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus Aerospace Industries Association of America, Inc. is the national trade association representing manufacturers of aerospace-related equipment; its membership, which includes petitioner General Dynamics Corp., routinely contracts with the Government for the design of equipment.

SUMMARY OF THE ARGUMENT

In *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510 (1988), the Court addressed the question of "when a contractor providing military equipment to the Federal Government can be held liable under state tort law for injury caused by a design defect." *Id.* at 2513. In answering that question, the *Boyle* Court established the requirements that must be met for a Government contractor to assert successfully the so-called "Government contractor" defense. One of the requirements established by *Boyle* is that "the United States approved reasonably precise specifications" for the equipment alleged to be defective. *Id.* at 2518.

Less than a year after *Boyle*, the United States Court of Appeals for the Fifth Circuit had occasion to determine what Boyle meant by the word "approved" in the phrase "approved reasonably precise specifications." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir. 1989). *Trevino* held that the Government has not "approved" a design feature developed by a contractor unless the Government actually exercised its discretion to select that design feature. *Id.* at 1486.

Trevino's answer to the question of what does and does not constitute Government "approval" for purposes of the Government contractor defense misinterprets *Boyle*, frustrates the policies that *Boyle* sought to advance, and causes conflict and confusion among the circuit courts as to the proper application of *Boyle*. Amicus Aerospace Industries Association of America, Inc. urges the Court to grant the petition for a writ of *certiorari* in order to correct *Trevino's* error and to guide the lower courts as they are called upon to decide when the Government contractor defense is available.

ARGUMENT

A. *Trevino's* Definition of "Approved" Conflicts with a Basic Premise of *Boyle.*

The Court in *Boyle v. United Technologies Corp.* adopted the following three-part test for determining the availability of the Government contractor defense to contractors who design military equipment for the government:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

108 S. Ct. at 2518. The United States Court of Appeals for the Fifth Circuit in *Trevino v. General Dynamics Corp.* then interpreted *Boyle's* test as follows:

> The government contractor defense as reformulated in *Boyle* protects government contractors from liability for defective designs *if discretion over the design feature in question was exercised by the government.*

865 F.2d at 1486 (emphasis added). This interpretation of *Boyle*, conditioning the availability of the Government contractor defense on whether the Government considered and selected the particular design feature alleged to be defective, cannot be squared with the central analytical underpinnings of *Boyle's* three-part test.

Boyle recognizes, implicitly but necessarily, that the Government contractor defense may be available in cases where the

Government had no knowledge of, much less exercised discretion over, a design defect in military equipment. As here relevant, *Boyle* requires as conditions of the defense that the contractor provided the Government with, and the Government approved, "reasonably precise" specifications, and that the contractor warned the Government of dangers known to the contractor but not known to the Government.[1] It follows that *Boyle* does *not* deny the defense where (i) reasonably precise specifications have been provided to the Government, but the later-alleged design defect is not disclosed by those reasonably precise specifications; and (ii) the Government contractor does not itself know of the defect.

Under *Boyle*, then, the Government contractor defense may be asserted successfully even though the Government, notwithstanding having examined reasonably precise specifications, never learned of the design defect that later came to be the central issue in a tort suit. If the Government was unaware of a defective feature of a design, then the Government cannot have exercised its discretion to choose or reject that defective feature. Yet the Government contractor defense is still available under *Boyle*, so long as the specifications were reasonably precise and the Government contractor withheld no information in its possession but not in the Government's.

This conclusion flows inevitably from *Boyle's* requirement that the specifications approved by the Government be only *reasonably* precise, as opposed to *exhaustively* precise. *Trevino's* holding that the Government contractor defense is available only if the Government exercised discretion over the actual design feature in question cannot be reconciled with *Boyle's* permissiveness regarding the design specificity

[1]As *Trevino* notes, "the second element, that the product comply with the design specifications, was not implicated in this case . . .." 865 F.2d at 1487.

necessary to satisfy *Boyle's* first requirement. It makes no sense to hold that the Government must approve a design feature that need not necessarily even have been provided to the Government; accordingly, *Trevino's* definition of "approved" is in error.

On this point, *Trevino* states: "The requirement that the specifications be precise means that the discretion over *significant details and all critical design choices* will be exercised by the government." 865 F.2d at 1481 (emphasis added). Amicus respectfully disagrees with this important assumption. In the sentence just preceding the one quoted, and elsewhere throughout the opinion, *Trevino* recognizes that the specifications need be only *reasonably* precise. *Id.* This certainly permits the possibility that certain detailed, albeit perhaps defective, design features will escape Government notice.[2]

Judge Jolly's dissent from the Fifth Circuit's denial of General Dynamics' request for an *en banc* hearing forcefully makes the point that "approved" was an inappropriate word for the Court to have selected if the Court intended that the Government contractor defense would be denied whenever the Government has not exercised its policy-level discretion to *select* a defective design. *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *reh'g denied en banc*, 876 F.2d 1154 (5th Cir. 1989) (Jolly, J., dissenting). *Boyle's* requirement that the specifications be only "reasonably precise," as opposed to "absolutely precise" or "comprehensive," is equally indicative that *Boyle* does not require that the Government consciously and substantively evaluate *every* aspect of a contractor-developed design.

---

[2]The point is not whether the defects alleged in *Trevino* were disclosed by General Dynamics' blueprints; it appears that they were. *See Trevino*, 865 F.2d at 1477 (General Dynamics supplied 71 pages of detailed working drawings). The point is that *Trevino's* definition of "approved" fails to account for the clear analytical implications of the three-part *Boyle* test.

Boyle's third requirement — that the contractor warn the Government of dangers of which the contractor is aware but of which the Government is unaware — equally betrays *Trevino's* analysis. The inescapable implication of this requirement is that the Government contractor defense is not lost merely because the contractor was unaware of, and therefore did not warn the Government of, a danger caused by a design defect. *Boyle* foresees that this may happen, notwithstanding the Government's scrutiny of reasonably precise specifications, and accounts for it in the carefully crafted third requirement. *Trevino's* requirement that the Government have considered the precise design defect at issue, or else the defense is lost, flies in the face of *Boyle's* recognition that some defective features will escape both the contractor's and the Government's evaluation.

Trevino's attempt to account for the presence of *Boyle's* third requirement is tortured at best. *Trevino* states:

> The Court's inclusion of a warning element must indicate that approval requires some level of evaluation and review; otherwise a government contractor might argue one day that it should have the benefit of the defense despite its failure to give a warning because the government had rubber-stamped the design, because the information withheld would have been of no use to the government and was not desired by the government, and because the provision of the information would not have affected the government's "approval" of the design.

865 F.2d at 1481. This analysis amounts to saying that the third requirement is important so that a contractor will not "argue one day" that it need not meet that very requirement; the third requirement supports *Trevino*, if at all, only when

Trevino assumes it away. Viewed straightforwardly, *Boyle's* third requirement refutes *Trevino*, for the simple reason that the Government cannot exercise discretion to choose a design defect that the contractor, unaware of it, has not disclosed.

The requirement that the contractor provide only *reasonably* precise specifications, and that the contractor warn of only *known* dangers, demonstrates that the Government contractor defense is not dependent in all cases upon the Government's deliberate selection of the allegedly defective design feature. *Trevino's* central holding cannot be squared with *Boyle's* plain language or with its analytical framework.

B. *Trevino's* Holding that the Courts Must Locate the Exercise of Government Discretion as to Discrete Design Features Threatens Undue Interference with the Government's Procurement Policies and Would Frustrate the Central Concerns of *Boyle*.

Trevino's interpretation of the requirement that "the United States approved reasonably precise specifications" is not only semantically and logically at odds with *Boyle's* three-part test; it also portends disruptive and unworkable judicial interference in the Government's military procurement decisions. *Trevino* thus frustrates the spirit, as well as the letter, of *Boyle*.

Boyle recognizes that balancing the needs of the military procurement process against the rights created by the Federal Tort Claims Act, 28 U.S.C. § 1346(b), necessitates some judicial inquiry into the availability of the Government contractor defense in individual cases.[3] But it is one thing for a court

[3]But there is no question that the rights of injured claimants must sometimes give way to the Government's interest. *Boyle* recognizes that "the federal interest embodied in the 'discretionary function' exemption" requires more than "a perfectly reasonable tort rule." 108 S. Ct. at 2518.

to examine the degree of precision in the design specifications provided to the Government by its contractors and to determine whether the Government approved those specifications, and quite another for the courts to evaluate in detail the Government's decisionmaking procedures in searching for the elusive "exercise of discretion" concerning the most minute details of equipment design. The latter exercise, required by *Trevino*, will put courts in the middle of the military procurement process, spawn conflicting results on similar facts, and burden the Government to an extent well beyond that sanctioned by *Boyle*.

Trevino states: "The trier of fact should not evaluate the wisdom or quality of any government decision, but must locate the actual exercise of the discretionary function." 865 F.2d at 1480. In purporting to do so, however, *Trevino* interprets the meaning of Government memoranda, second-guesses the Government's personnel assignments, and weighs the respective expertise of the Government's and the contractor's engineers. 865 F.2d at 1486. Thus, in the guise of searching for the Government's exercise of discretion, *Trevino* actually displaces that discretion.[4] If a court disagrees with the Government's design choice in a given case, it need only undertake a *Trevino*-like microscopic analysis of the Government's decisionmaking process to conclude that what appeared to be an exercise of discretion, such as deciding which personnel would review a contractor's design proposals, was instead an abdication of it. Nothing in *Boyle*, in the discretionary function

[4]For example, *Trevino* acknowledges that the Government may exercise its discretion through incompetent personnel, but states that the use of incompetent personnel "may be evidence that the government does not intend to exercise design discretion . . ." and concludes "[t]hat seems to be the case here." 865 F.2d at 1487 n.12. This loose analysis is *carte blanche* for the courts to question, and thus to penalize through denial of the Government contractor defense, military decisions on how to allocate personnel resources.

exemption of the Federal Tort Claims Act, or in separation-of-powers principles, justifies this result.

The thrust of *Trevino* is to minimize the role of Government contractors in the design of military equipment. There is functionally little difference in requiring that the Government develop all military designs, and requiring, as *Trevino* does, that the Government weigh the merits of every design feature, no matter how detailed, developed by its contractors for it. *Trevino* thus has the effect of imposing the requirement set forth in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 108 S. Ct. 2896 (1988), that the Government contractor's participation in the design process be minimal if the Government contractor defense is to be available. *Boyle*, of course, expressly rejected *Shaw's* restrictive approach. 108 S. Ct. at 2518. *Boyle* teaches that it is not the courts' place to decide whether or when the Government should rely upon contractors to develop designs for military equipment. The practical application of *Trevino* threatens exactly such interference.

C. *Trevino*'s Narrow Interpretation and Application of the Government Contractor Defense Test Conflicts With the Test as Applied in Other Circuits.

In holding that the Government contractor defense was not applicable in *Trevino*, the Fifth Circuit focused on the manner and timing of the Government's participation in the development of the designs created by General Dynamics. According to *Trevino*, the only method by which the approval requirement of *Boyle* can be met is by the Government's substantive review and evaluation of the allegedly defective design feature.

Trevino's interpretation of *Boyle* creates a conflict with other circuits and within the Fifth Circuit itself. In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), a case decided the same day as *Trevino*, a different panel of the Fifth Circuit examined the phrase "reasonably precise specifications" within the meaning of *Boyle's* first requirement. Although *Smith* focused primarily on this aspect of the *Boyle* test, it was implicit in *Smith* that Government approval requires only the Government's review and assent, which is, as Justice Jolly stated, a "considerably less stringent requirement than imposed by the *Trevino* panel." *Trevino v. General Dynamics Corp.*, 865 F.2d 1474 (5th Cir.), *reh'g denied en banc*, 876 F.2d 1154, 1157 (5th Cir. 1989) (Jolly, J., dissenting). Although the two Fifth Circuit panels emphasized different aspects of the Government contractor test, a fair reading of their respective opinions places them clearly in conflict in their interpretations of *Boyle*.

In dissenting from the Fifth Circuit's denial of General Dynamics' request for an *en banc* hearing, Judge Jolly, who authored the opinion in *Smith*, stated: "I believe that *Trevino* has effectively rewritten the Supreme Court's test for government contractor immunity given in *Boyle* . . .." *Id.* at 1155. Specifically, the dissent faulted *Trevino's* failure to use the "plain meaning" of approval, with the result of forcing the Government to "*establish* reasonably precise specifications . . .." *Id.* (emphasis in original). According to the dissent, the proper inquiry under *Boyle* to determine whether there has been approval is as follows:

> was the challenged feature disclosed with reasonable precision in the accepted design documents, and was the design accepted on behalf of the government by an officer who had, and knew he or she had, the duty and authority to decline or accept the challenged

> design feature on safety grounds if he or she deemed it appropriate to do so?

Id. at 1156.

This interpretation of *Boyle* is supported by *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311 (11th Cir. 1989), in which the court stated:

> In *Boyle*, the Court recognized a broad formulation of the government contractor defense that shields manufacturers of products made for the government from tort liability for flaws in product design.
>
> * * *
>
> In the military context, this immunity serves the further important purpose of shielding sensitive military decisions from scrutiny by the judiciary, the branch of government least competent to review them.

Id. at 1315.

In upholding the Government contractor defense, *Harduvel* stated that the "defense requires 'only that the government approve reasonably precise specifications,' and is met where, as here, the contractor incorporated government performance specifications into a design that the government subsequently reviewed and approved." *Id.* at 1320 (citing *Smith v. Xerox Corp.*).

The notion of Government approval suggested in *Smith* and applied in *Harduvel* is clearly broader than that found in *Trevino*. While *Trevino* demands greater involvement by the judiciary in determining whether the military made appropriate procurement decisions, *Smith* and *Harduvel* recognize *Boyle*'s purpose to preserve the military's discretion in the procurement area. Clearly, *Trevino*'s narrow interpretation of approval

cannot be reconciled with the broad interpretation of the Government contractor defense set forth in *Boyle* and followed in both *Smith* and *Harduvel*.

D. The Navy's Continued Use of the Equipment with Knowledge of the Alleged Defects Constitutes Approval under the Government Contractor Defense.

Boyle does not address the issue of when the Government's approval of a design must occur. Lower courts have held that the Government's approval can be manifested by the subsequent use of the equipment by the military where such use is accompanied by the military's knowledge of the alleged defect. In *Schwindt v. Cessna Aircraft Co.*, CV485-472 (S.D. Ga. 1988), the court refused to limit the time of Government approval to the design and delivery stages, stating as follows:

> the relevant time to evaluate the first prong is not limited to the time when the Air Force originally took delivery of the 0-2 aircraft. The Air Force's later decisions regarding the equipment may constitute approval of reasonably precise specifications.

Mem. Op. at 7.

Although there was ample evidence in *Trevino* that the Navy used the diving chamber with the knowledge of, and after experience with, the alleged design defects, *Trevino* failed to give this fact any weight in its decision. This failure overlooks a wealth of subsequent history and puts *Trevino* in conflict with other circuits on this score as well.

In *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986), *cert. denied*, 108 S. Ct. 2897 (1988), the contractor had designed the equipment without any participation by the Army.

However, the court found that the contractor met its burden of proving that the Government approved reasonably precise specifications when it showed that the Army continued to use the equipment after learning of the design defects. Indeed, the Government's decision to continue to use the equipment with the known defects "amply establish[es] government approval of the alleged design defects." *Id.* at 412; *see also Ramey v. Martin-Baker Aircraft Co.*, 874 F.2d 946 (4th Cir. 1989). Thus, even in the absence of contemporaneous consideration of the design by the military, these cases conclude that approval by the Government occurs when the military makes use of the equipment after obtaining knowledge of the design defects.

The facts in *Trevino* were that the Navy knew of the alleged defects from the time it began to manufacture the diving chamber and on at least four occasions had experienced problems similar to the one that occurred on the date of the accident. The Navy's continued use of the diving chamber with knowledge of the alleged design defects constituted approval under prior case law — *Trevino's* failure to credit these facts puts it into direct conflict with that case law and further supports General Dynamics' petition.[5]

---

[5]Similarly, Judge Jolly would hold that when the Government makes use of equipment for a period of years with no complaints, and has knowledge of design defects, it has approved the contract specifications within the meaning of *Boyle*. 876 F.2d at 1156.

CONCLUSION

For the foregoing reasons, Amicus Aerospace Industries Association of America, Inc. urges that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

DUNAWAY & CROSS
MAC S. DUNAWAY
Counsel of Record

GARY E. CROSS
PETER B. SHERMAN

1146 19TH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 862-9700

ATTORNEYS FOR AMICUS
AEROSPACE INDUSTRIES
ASSOCIATION OF AMERICA, INC.

September 8, 1989